BUSINESS LAW SECTION

NONPROFIT & UNINCORPORATED ORGANIZATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA
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TO: The State Bar Office of Governmental Affairs

RE: A.B. 624 (Coto), as amended March 3, 2008

Committee Position:

☒ Oppose

Date position recommended:	March 27, 2008	
Nonprofit & Unincorporated Organizations Committee vote:	February 29, 2008: unanimous approval of Members attending (a quorum being present)	March 27, 2008: 4-0 (drafting committee approval of revisions, per delegated authority)
Executive Committee vote:	March 14, 2008: 15-0 (delegation of authority to Legislative Subcommittee)	March 27, 2008: 6-0 (vote of Legislative Subcommittee)
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I. STATEMENT OF POSITION

The Nonprofit & Unincorporated Organizations Committee (the "Committee") of the Business Law Section of the State Bar of California welcomes this opportunity to comment on Assembly Bill No. 624 ("AB 624" or the "bill"). This is the second statement of position that the Committee has submitted on AB 624, the previous one having been submitted when the bill was under consideration in the Assembly. After careful further consideration of the bill under consideration in the Senate, the Committee continues to oppose AB 624 as now amended.

A. Overview.

The Assembly Judiciary Committee Analysis indicated that the proposed bill is designed to improve diversity in private grant-making and to that end requires collection and publication of racial, gender and (in some cases, as described below) sexual orientation data from granting foundations and their grantees. That Analysis also details other, voluntary methods and alternatives to the bill's requirements that are already well under way to achieve that end. Although the underlying goals of the bill may be laudable, it has fatal flaws that would prevent it from achieving them.

The proposed bill would not advance governance of foundations. On the contrary, the bill is unconstitutionally and impermissibly intrusive at many levels, to foundations, their grantees, grantees' beneficiaries

and businesses with which foundations interact, as well as to the boards of directors and employees of each of the foregoing (see C.1. and D. below). Even if a foundation and its grantees could lawfully obtain, assemble and make public the data the bill requires,[1] the lack of clarity as to who and what are described (see C.3. below) and the immensity of the task (if made clear) would burden nonprofits well out of proportion to any benefit that might result (see C.2. and C.4. below). Many of the key terms purporting to describe data to be assembled are so vague, undefined or ambiguous as to defy collection (see C.3. and E. below). As a result, the bill, if enacted, is likely to adversely impact the efforts of California charitable foundations in making, as well as the ability of worthy beneficiaries in receiving such grants.

B. Description of AB 624.

The bill would add Corporations Code Section 5081 and Probate Code Section 16065. Initially the bill referred only to private foundations. The bill has been amended to apply also to "corporate" and "public operating" foundations.

The bill would require a nonprofit corporation (including a religious corporation) and a trust, in each case that is "deemed" to be a "private, corporate or public foundation" with assets over $250,000,000, to collect specified ethnic, gender and (in some cases) sexual orientation data pertaining to its governance, staffing, grant-making and business. This information includes: the racial and gender composition of its board of directors and staff, the number and percentage of contracts awarded to businesses owned by described ethnic groups, the number of grants and grant dollars awarded to organizations specifically serving various ethnic and sexual orientation "communities," the number of grants and grant dollars awarded to organizations where 50% or more of the boards or staff are ethnic minorities, and the number and amounts of grants to organizations "specifically serving predominantly low-income communities." The nonprofit organization would have to post this information on its website and include this information in its annual report. The bill states that its requirements "apply only to a foundation's domestic grants."

C. The Committee's Position.

The Committee's opposition to AB 624 is based on the following:

1. Unconstitutionality.

The bill requires foundations to gather, compile and publish racial, ethnic and gender and also, in some cases, sexual orientation, data. These requirements unconstitutionally intrude into the personal affairs of the board members and staff of foundations, and extend beyond the foundations to grant recipients, beneficiaries, and businesses that interact with foundations. Such intrusiveness clearly conflicts with California's constitutional and statutory rights of privacy; mandatory collection of the data is impermissible and if done could result in liability to those collecting and disseminating it. This could lead a foundation to avoid that risk by avoiding "domestic grants" to the detriment of "domestic" potential recipients. The constitutional provisions and judicial decisions contravened by the bill are detailed in D. below.

2. Cost and Burden.

This bill would be extremely costly and burdensome to the covered foundations, to their grant-recipients and their beneficiaries. It would impose multiple layers of administration and costs due to its requirements to

1 The Committee does not address in this letter whether an organization subject to the California Fair Employment and Housing Act could properly seek the required information from its employees. *See, e.g.*, Government Code Section 12940(d). Such omission may not be construed to indicate that the Committee believes such organization could do so or to indicate absence of concern by the Committee of the impact that claims or potential claims on that ground potentially might have on organizations that would be subject to the bill.

secure, maintain, analyze and report extensive data. Checking on completeness, accuracy and timeliness of data (if collected) would further add cost and burden. These costs and burdens will inevitably reduce the funds available for grants and divert attention from the worthy business of those subjected to them.

3. Doubt as to Coverage.

It is not clear as to what organizations this proposed bill will apply. Initially the bill referred only to private foundations. "Private foundation" is a well recognized term of art that refers to a subset of nonprofit exempt organizations. It is clearly defined in the Internal Revenue Code. However, the bill now also includes corporations "deemed" to be "corporate" and "public operating" foundations. Neither "corporate foundation" nor "public operating foundation" is defined under the California Nonprofit Corporation Law or the Internal Revenue Code and neither is otherwise a term with clear meaning. Neither term is understood by members of the Committee to refer to a clearly defined group of organizations. The term "foundation" itself has a somewhat uncertain coverage. "Corporation" for purposes of Section 5081 would include public benefit, mutual benefit and religious corporations, but those entities, other than private foundations, would find it extremely difficult to determine whether they are "deemed" to be covered by the statute. Indeed, it is not at all clear what "deemed" means; that is, who makes that determination and by what standard is an entity to be "deemed" covered by the law?

Possible (but by no means clear) interpretations are that community foundations and *private* operating foundations (categories recognized in the Internal Revenue Code) are included as a result of this change. Since the "corporations" subject to Corporations Code § 5081, if enacted, would include religious corporations, large churches or religious organizations that make "grants" might also be included. Community foundations receive contributions from large numbers of persons. For many of them, donor-advised funds now constitute a significant portion of their support. Typically, contributors to a donor-advised fund will inform the community foundation of how the contributors wish to see some or all of the funds disbursed. As long as a recipient is a qualified exempt organization or charitable beneficiary, a community foundation will generally honor the request of the contributor. However, if, in addition to determining whether the exempt organization is qualified to receive the contribution, the community foundation needs to obtain (and verify) from the proposed recipient charity, the answers to all of the questions required under this bill, it is unlikely that the community foundation will be financially able to honor the donors' requests, particularly if the proposed contributions are not large, or designate relatively unknown organizations. Donor-advised funds have appealed to small donors, as a cost effective alternative to private foundations and supporting organizations. However, if this bill is enacted, community foundations may cease to accept donor-advised funds, or may be forced to charge higher fees to administer them or to decline some requests, with a result that the donor-advised fund vehicle will become significantly less attractive to such donors who want to participate in philanthropy, but on a smaller and cost effective scale. It is extremely possible that this interpretation would result in many nonprofits thus having no reasonable way to comply with the bill, should it become law, and would frustrate the desires of small individual donors.

The ambiguities do not stop here. For example, it is unclear whether "assets over $250,000,000" refers to net or gross assets. Is an organization with gross assets over $250,000,000, but with significant corresponding liabilities to be included? At what point in time is this figure to be computed? What accounting method is to be used (e.g. cost or fair value)? If the valuation of the organization's assets falls below $250,000,000 for a particular year, is it then exempt from complying with the law during that year?

4. Rights of Donors in the Voluntary Sector.

The United States is unique in that it has a large number of nonprofit organizations that are funded and controlled, not by the government, but by individuals who have voluntarily contributed both time and money to support the causes that are of concern to them. Donors are able to designate the purpose or purposes for which they want their funds to be used. In fact, if the funds are given for a particular purpose, they must be used for that purpose. As long as the purpose is legal, the recipient organization cannot use the funds for another purpose without permission from the court and/or the Attorney General.

Because these are voluntary contributions, it is appropriate that the donor be able to decide how his or her money is to be spent. This is a private decision, as long as the purpose is legal. If a donor wants to donate to organizations that support promotion of ethnic and gender participation, that clearly should be the donor's choice. However, if the donor wants to support, for example, emergency relief efforts, or the provision of food or housing for the poor, that should be the donor's choice. This bill effectively takes this choice away. If it passes, then some portion of every dollar that is or has been donated to a covered entity will be used to support the promotion of ethnic and gender participation or the covered entity risks public opprobrium for conducting its operations in a manner that is nonetheless legal and perfectly proper. Regardless of how worthy this purpose might be, the bill would elevate this purpose at the expense of the covered entity's own worthy missions, and would elevate this goal over the desired goals of the individual donors. It would legislate that, in effect, the single goal of increased diversity is more important than the overarching philanthropic goal itself, and that all covered entities must now fund not only their own missions, but the mission of promoting ethnic and gender participation.

Unlike the for-profit sector, the nonprofit sector is dependent upon voluntary contributions. It cannot simply raise the costs for goods and services provided, to make up for the costs to implement government regulation. The cost of this proposed bill will come directly from donated funds that are supposed to be used to support the charitable purposes for which the organization received its exempt status.

D. Constitutional Issues.

Article I, Section 1 of the California Constitution specifically assures the right of privacy: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." The importance of the right to privacy is recognized by California courts. By this provision, California accords privacy the constitutional status of an inalienable right, on a par with defending life and possessing property. Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1, 15 (1990).

As further noted by the court, the right of privacy under California law was recognized even before it was added to our state constitution:

> "Before 1972 [when this constitutional amendment was adopted], California courts had found a state and federal constitutional right to privacy even though such a right was not enumerated in either constitution, and had consistently given a broad reading to the right to privacy. [citations omitted] The elevation of the right to privacy to constitutional stature was intended to expand, not contract, privacy rights." *Id.* at 17.

Today, our California State Constitution includes an express right to privacy, which in many contexts is actually more protective of privacy than the right to privacy implied in the federal Constitution. See Alfaro v. Terhune, 98 Cal.App.4th 492 (2002).

The right to privacy that is protected by our state constitution is not only protection from state action. Rather, this right of privacy is considered an inalienable right which may not be violated by private parties. Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288 (2002). The constitutional privacy right embodied in our state constitution protects individuals from the invasion of their privacy not only by state actors but also by private parties. Leonel v. American Airlines, Inc., 400 F.3d 702 (9th Cir. 2005), opinion amended on denial of rehearing 2005 WL 976985; *see also* Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 129 Cal.App.4th 1228 (2005), on remand 2006 WL 4055411. The California Supreme Court has stated that

> "[L]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." Hill v. National Collegiate Athletic Assn., 7 Cal.4th 1, 35 (1994).

California courts have clearly held that, "the details of one's personal life," including one's sexual orientation, are protected private information. Davis v. Superior Court, 7 Cal.App.4th 1008, 1019 (1992).

The bill seeks to require its "foundation" subjects to seek private information of persons with whom they do business, thereby subjecting them to liability for invasion of privacy. The bill requires an organization wishing to obtain business contracts with, or grants from, these foundations to obtain and compile private information regarding its owners or staff persons and board members and to disclose that information to those foundations. This requirement undermines the right to "informational privacy," which protects individuals from requirements that they disclose their sexual orientation or race, instead requiring that such private information be ***requested, collected, compiled and disclosed to*** the nonprofits and tabulations using that information published by the nonprofits. At the same time, the bill violates the right to "autonomy privacy" by interfering with the affected individuals' interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.

The mandate of the proposed bill will ultimately subject such organizations, along with the nonprofits requiring the information, to liability to any person whose private information is collected and disclosed as required by this bill. Its requirements seek to convert what is now considered confidential information that an individual may not be required by law to disclose, into information that nonprofit organizations will be required to obtain and publish for all to see. Because the constitutionally guaranteed right to privacy cannot be superseded by state statute, compliance with the statute will not protect nonprofit organizations from liability for such blatant invasions of an individual's privacy rights.

If this bill is enacted, organizations devoted to the protection of individual rights of privacy will surely challenge its application in court immediately following its passage. Such a blatant effort to eliminate this constitutional right to informational privacy will also be tested in our courts by persons whose privacy is invaded as a result of its application. We believe that this law would be a violation of the right of privacy set forth at Article I, Section 1 of the California Constitution.

Proposition 209, passed in 1996, evidences the public policy of the State of California in opposition to actions which, ". . . discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." California Constitution, Article I, Section 31. The proposed bill would almost certainly lead to action that may violate that public policy.

Rather than encouraging diversity of race or sexual orientation, the proposed bill could instead be used as a weapon by those who wish to obtain such data for the purpose of engaging in discrimination. The practical result of this bill's passage may be to create tools that may be useful to persons with bad intentions, by forcing identification of persons whom bad actors wish to target. Persons who suffer injury as a result of collection or disclosure of their private information are likely to seek redress against the entities responsible for damage they may suffer as a result. If courts find that the privacy rights of such victims have been violated, the existence of the first element of a claim for damages will have been successfully demonstrated: breach of the duty to maintain confidentiality of their private information.

E. Textual Defects and Practical Problems.

The bill would create impossible problems of interpretation and compliance, some of which have already been mentioned above. The following are some of the more serious additional examples. It is important to realize, however, that even fixing these problems will not overcome the fatal failures of the bill mentioned above.

Use of the word "including" preceding the listing of various categories leaves open the question as to whether other similar possible groups are also covered and, if so, how or by whom is such coverage to be determined.

There is no indication as to the frequency or timing for collection or verification of required data. Thus, an organization attempting to comply will have to determine at its risk what date to use or how frequently data collected must be updated and what steps are sufficient to assure completeness and accuracy. Caution is likely to suggest more frequent rather than, for example, only annual collection, and this will exacerbate the burdens and costs already mentioned. The flat requirement to collect and publish the data appears to imply that it must be correct. Verification of information supplied would be costly (as already noted). Verification also would be difficult, if not impossible, especially as to data supplied by would-be grantees or businesses seeking contracts. Further, some data, such as that which might be supplied by large companies, could be so voluminous as to be meaningless.

It is unclear whether the "percentage of business contracts" referred to in subsection (a)(5) refers to the percentage of the number of contracts or the percentage in value of contracts. The absence of guidance makes the bill all the more confusing.

The phrase "organizations specifically serving" used in subsection (a)(6) is ambiguous. It is unclear whether "specifically" means "only serving", "mainly serving" or "somewhat but not exclusively serving" indicated groups.

The term "community" does not have a clearly understood specific meaning. Black's Law Dictionary defines it as "1. A neighborhood, vicinity, or locality. 2. A society or group of people with similar rights or interests. 3. Joint ownership, possession or participation." This legal definition may not be what is intended but interpretation of a substantive term in a statute is likely to be construed in accordance with its ordinary legal meaning, if possible. However, with rare exceptions, it is likely to be impossible for someone attempting to comply with the law to determine which, if any, persons or groups of persons rise to the level of "communities". The problem created by the use of this term is exacerbated by the reference in this same provision to "other under-represented communities". The use of the word "other" implies that all of the preceding "communities" are under-represented. There is no guidance whatsoever as to what other under-represented communities or groups may be within the law's intentions. There is also no guidance as to what lack of representation is meant - "political", "grants received", or other?

The fact that "organization" is defined as an organization described in Section 501(c)(3) of the Internal Revenue Code is not particularly helpful in determining what is included, since (a) an organization within the description of Section 501(c)(3) may not have actually qualified as being exempt and others (such as churches) may not be required to obtain exemption to be covered. Assuming existence of actual exemption is intended by the use and definition of this word, a foundation would be required to investigate whether the organization has actually complied with the requirements for exemption in evaluating whether it is covered by the bill.

It is our understanding that in voluntarily seeking to maximize appropriate diversity in a foundation itself and in its grants, the grant making industry is attempting to achieve diversity well beyond the specific categories described in the bill. For example, in some cases the bill refers to ethnic minorities and in other cases refers to a list of purported specific communities. In doing so it fails to recognize many worthy groups. No guidance is given as to the meaning of ethnic minorities unless it is limited to the specific groups listed and, if it is not, no indication is given in what context or in what geographical area an ethnic minority is to be determined. The limitation of the bill to a foundation's "domestic grants" also creates ambiguities as there is no guidance as to the scope of that. Even if ethnic minorities are to be determined on a state-wide basis (in contrast, e.g., to a regional or nationwide basis), difficulties remain, since collection of data even on a state-wide basis is not only sporadic but also inherently somewhat unreliable. Further, in California today, there is no one ethnic group that is in the majority and thus all of them are "minorities."

F. Conclusion.

All of this may negatively impact the ability of worthy beneficiaries in California to obtain grants from whatever foundations the bill would cover. Even if a foundation could lawfully assemble the required information, potential grantees might fail to receive aid due to their unwillingness or inability to provide and verify required data.

II. GERMANENESS

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on the bill and that the positions advocated herein are in the best interests of California nonprofit organizations and the constituent interests that they serve.

III. CAVEAT

This statement is only that of the Nonprofit & Unincorporated Organizations Committee of the Business Law Section of the State Bar of California. The positions expressed herein have not been adopted by the Business Law Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Business Law Section.

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